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October 16, 2003

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Initial Comments, CC Docket Nos. 01-338 *et al.*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

Dear Ms. Dortch:

Attached for filing in the above-captioned docket please find the Initial Comments of the CLEC Coalition: Excel Telecommunications, Inc., KMC Telecom Holdings, Inc., NuVox Inc., SNiP LiNK LLC, Talk America, VarTec Telecom, Inc., XO Communications, Inc., and Xspedius LLC.

Please do not hesitate to contact me with any questions or concerns regarding this matter: 202.955.9890.

Sincerely,



Stephanie A. Joyce
Counsel for the CLEC Coalition parties

Attachment

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

**Review of the Section 251 Unbundling
Obligations of Incumbent Local Exchange
Carriers**

CC Docket No. 01-338

**Implementation of the Local Competition
Provisions of the Telecommunications
Act of 1996**

CC Docket No. 96-98

**Deployment of Wireless Services Offering
Advanced Telecommunications Capability**

CC Docket No. 98-147

COMMENTS OF THE CLEC COALITION

**EXCEL TELECOMMUNICATIONS, INC.,
KMC TELECOM HOLDINGS, INC.,
NUVOX INC.,
SNIP LINK, LLC,
TALK AMERICA,
VARTEC TELECOM, INC.,
XO COMMUNICATIONS, INC.,
AND XSPEDIUS LLC**

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October 16, 2003

SUMMARY

The Commission's current pick-and-choose rule, 47 C.F.R. § 51.809, is an essential tool for enabling and cultivating widespread local competition, as intended by Congress. Time has proven that Section 252(i) and Rule 51.809 have served to level the great disparity in bargaining power between ILECs and CLECs, as well as to guard against discrimination in favor of larger carriers and against smaller ones. In addition, the statute and rule have served to successfully reduce barriers to entry by keeping the costs of obtaining an acceptable interconnection agreement reasonable where business volumes and company resources are insufficient to support a full-blown negotiation and arbitration. Moreover, the Commission's premise for proposed rule change amounts to nothing more than the latest ILEC lobbying campaign designed to sell a message divorced from law, sound public policy, and the reality of today's marketplace (as opposed to the message they told and the Commission apparently believes exists). And it flatly contravenes the express language of Section 252.

In short, the fear that CLECs can cherry-pick and take the so-called *quid* without the *quo* under the Commission's rules is just plain wrong. The Commission's "legitimately related" requirement – abused regularly by those same ILECs that have led the Commission to ignore it in its *FNPRM* – prevents that from being a reality. Indeed, the legitimately related requirement provides the ILECs with both the incentive and flexibility to negotiate. Unfortunately, the ILECs' success in muting or mooted other market-opening provisions of the Act have dulled the incentives to negotiate provided by the FCC's existing rule.

The CLEC Coalition therefore suggests that the Commission retain Rule 51.809, but provide clearer guidance as to its applicability under the "legitimately related" requirement. With these modifications, the Commission will better ensure the "meaningful negotiations" that it seeks to establish in this proceeding.

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HOLDINGS, INC., NUVOX INC., SNIP LINK, LLC, TALK AMERICA,
VARTEC TELECOM, INC., XO COMMUNICATIONS, INC., AND XSPEDIUS LLC**

Excel Telecommunications, Inc. (“Excel”), KMC Telecom Holdings, Inc.
 (“KMC”), NuVox Inc. (“NuVox”), Talk America (“Talk”), VarTec Telecom, Inc. (“VarTec”),
 XO Communications, Inc. (“XO”), and Xspedius LLC (“Xspedius”) (collectively the “CLEC
 Coalition”), through counsel, hereby submit their joint comments in the above-captioned
 proceeding.¹

I. INTRODUCTION

The Commission’s current pick-and-choose rule, 47 C.F.R. § 51.809, which the
 Supreme Court upheld as eminently reasonable and in keeping with the language of Section

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003), published at 68 Fed. Reg. 52276 (Sept. 2, 2003) (“FNPRM”).

252(i),² is a necessary mechanism for leveling the playing field in interconnection negotiations that must not — and, indeed, cannot — be removed.

The initial record in this case, taken in 2001 on the matter of proposed modifications to the Commission's pick-and-choose rule, demonstrates that this rule is required as a matter of statutory mandate and competitive necessity.³ Moreover, the plain text of Section 252(i), as enacted by Congress and interpreted by the Supreme Court, simply does not permit the adoption of the "all-or-nothing" rule that the Commission proposes. Thus, the Commission must retain its pick-and-choose rule, and should limit its decision here only to providing additional guidance with respect to the rule's application.

The business of entering the local telecommunications market is little changed since 1996. Entry remains an arduous process, and depends absolutely on the expeditious and timely execution and approval of interconnection agreements. The ILECs have virtually no business incentive to facilitate this process. Accordingly, interconnection negotiations are usually extremely difficult and expensive, because CLECs must battle furiously simply to obtain the rights that Congress and the FCC have legally provided them. This predicament is ameliorated only by the fact that Congress has created some minimal requirements that ILECs must follow. First, they must negotiate with CLECs.⁴ Secondly, they must permit CLECs to adopt all or portions of previously approved agreements.⁵ Absent either requirement, CLECs

² *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 395-96 (1999).

³ *E.g.*, CC Docket No. 01-117, Comments of Sprint Corp. (July 3, 2001); Comments of Covad Communications Company (July 3, 2001); Opposition of Focal Communications Corp. (July 3, 2001); Comments of AT&T Corp. (July 3, 2001); Comments of Z-Tel Communications, Inc.; Comments of WorldCom, Inc. (July 3, 2001); Reply Comments of the Association of Communications Enterprises ("ASCENT") (July 18, 2001); Reply Comments of Focal (July 18, 2001); Reply Comments of ALTS (July 18, 2001); Reply Comments of AT&T Corp. (July 18, 2001); Reply Comments of WorldCom, Inc. (July 18, 2001); Letter of Pamela S. Arluk, Senior Counsel, Focal, to Magalie R. Salas, Secretary, FCC (Aug. 8, 2001) ("*Focal Ex Parte*").

⁴ 47 U.S.C. § 252(a).

⁵ 47 U.S.C. § 252(i).

have no leverage whatsoever to obtain the agreements that will enable their entry and provision of competitive service.

The Commission now proposes to eliminate a crucial component of the latter requirement, which would have the result of destroying one of the tools expressly created by Congress to mitigate the disparity in bargaining power between ILECs and CLECs. As a matter of both law and policy, this course is unfounded. For, as the record already shows, the Commission's initial pick-and-choose rule was blessed by the Supreme Court as being "the most readily apparent" implementation of Section 252(i). In addition, the experience of CLECs, as relayed in the initial comments on this issue, demonstrates that pick-and-choose must be retained in order to quell the overwhelming power of ILECs to force disadvantageous interconnection terms on their competitors, to protect smaller carriers against discrimination, and to reduce the barrier to entry associated with negotiating and arbitrating entire agreements. The Commission's proposal should therefore be rejected in favor of a proposal that does not replace, but rather enhances, the existing pick-and-choose rule by better defining its applicability.

II. SECTION 252(i) PROHIBITS THE FCC FROM FORCING CLECs TO ACCEPT AGREEMENTS IN THEIR ENTIRETY

The Commission cannot eliminate pick-and-choose and remain consistent with Congress's mandates in the 1996 Act.⁶ Section 252(i) could not be more clear that ILECs "**shall** make available **any** interconnection, service, or network element provided under an agreement approved under this section."⁷ Further, the legislative history to Section 252(i) is very specific in stating that Congress intended to "make interconnection more efficient **by making available to**

⁶ FNPRM ¶ 721 ("we seek comment on the Commission's legal authority to alter its interpretation of the statute").

⁷ 47 U.S.C. § 252(i) (emphasis added).

other carriers the individual elements of agreements that have been previously negotiated.”⁸

Accordingly, the Commission held unequivocally in 1996 that “[r]equiring requesting carriers to elect entire agreements, instead of the provisions relating to specific elements,” flatly contravenes the statute.⁹ Indeed, the Commission found that this conclusion was compelled by the statute,¹⁰ which has not changed.

The Supreme Court held in *Iowa Utilities* that this interpretation “is not only reasonable, it is the most readily apparent” under the language of Section 252(i).¹¹ The Court went on to state that the resultant rule was actually “more generous to incumbent LECs than § 252(i) itself.”¹² That is, the Commission limited pick-and-choose by providing three exemptions: ILECs need not permit a CLEC to pick a discrete provision of an existing agreement where (1) compliance with that provision, standing alone, is technically infeasible; (2) too long a period has passed since adoption of the preexisting agreement; and (3) the provision is “legitimately related” to other provisions such that it cannot be adopted by itself.¹³ These limitations, according to the Supreme Court, afford ILECs more protection than Section 252(i), but were deemed a reasonable gloss on the statute as “matter[s] eminently within the expertise of the Commission.”¹⁴

Thus, the Commission has some discretion under Section 252(i) as to the scope of pick-and-choose. It has *no* discretion, however, to abrogate its mandate entirely, as the *FNPRM*

⁸ S. Rep. No. 104-23, 104th Cong., 1st Sess. at 21-22 (1995) (emphasis added).

⁹ *Local Competition First Report and Order*, 11 FCC Rcd. at 16138, ¶ 1310.

¹⁰ *Id.*, 11 FCC Rcd. at 16138, ¶ 1310 (“Thus, Congress drew a distinction between ‘any interconnection, service, or network element[s] provided under an agreement,’ which the statute lists individually, and agreements in their totality.”).

¹¹ 525 U.S. at 396.

¹² *Id.*

¹³ *Id.* (citing 47 C.F.R. § 51.809).

¹⁴ *Id.*

proposes to do. Section 252(i) could be no more clear in requiring ILECs to allow CLECs to take “*any* interconnection, service, or network element.” The Supreme Court has held that the word ‘any’ in a statute “has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”¹⁵ What the *FNPRM* now proposes would “render as mere surplusage” Congress’s clear and “expansive” language, something that the Commission refused to do in 1996.¹⁶ Yet the Commission has no authority not to follow Congress’s instructions, regardless of whether they are indisputably clear¹⁷ or somewhat ambiguous.¹⁸ Nor can it reverse course so sharply based on the existing record.¹⁹ Accordingly, the Commission has no authority to eliminate pick-and-choose and require CLECs to adopt interconnection agreements in their entirety.

III. THE COMMISSION’S PROPOSAL UNLAWFULLY ABRIDGES STATE AUTHORITY TO REVIEW AND APPROVE INTERCONNECTION AGREEMENTS UNDER SECTION 252(e)

With its tentative conclusion, the Commission is proposing a severe limitation on the right of state commissions to reject a negotiated agreement as discriminatory. This limitation directly contravenes Section 252(e), which requires that “[a]ny interconnection agreement adopted by negotiation or arbitration *shall be submitted for approval to the State commission,*” 47 U.S.C. § 252(e)(1) (emphasis added), and empowers states to reject any agreement “if it finds

¹⁵ *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (vacating concurrent criminal sentence for drug trafficking under federal statute prohibiting such sentence from being concurrent with “any other term of imprisonment”).

¹⁶ *Local Competition First Report and Order*, 11 FCC Rcd. at 16138, ¶ 1310.

¹⁷ *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 229 (1994) (“an agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear”); *Consumer Product Safety Comm’n v. GTE Sylvania*, 447 U.S. 102, 108 (1980) (“Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”).

¹⁸ *Chevron, U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 845 (1984) (“we should not disturb [an agency decision] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned”).

¹⁹ *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (“while the agency is entitled to change its view on the acceptability of [an existing rule], it is obligated to explain its reasons for doing so”).

that (i) the agreement (or portion thereof) *discriminates against a telecommunications carrier* not a party to the agreement; or (ii) the implementation of such agreement or portion is *not consistent with the public interest, convenience, and necessity.*” *Id.* § 252(e)(2)(A) (emphasis added).

Although the Commission purports to reject efforts to rob states of their authority to review agreements,²⁰ that position is substantially undercut in a footnote in which the Commission explains its proposed parameters for such state review. Footnote 2150²¹ to paragraph 725 states that, under the new rule,

[S]tate commissions could not prevent [an agreement’s] implementation by rejecting a proposed interconnection agreement on the ground that it is available to competitors only on a package-deal basis. Rather, the state commission could reject a customized agreement as discriminatory only if the commission found that the parties intended to discriminate against other carriers. The fact that a third party might be unable to opt into the agreement as a practical matter would not constitute unreasonable discrimination in light of the availability of interconnection, UNEs, and services under the state-approved SGAT.

In other words, states would face an unprecedented restriction on the authority that Congress granted them to reject an agreement that is discriminatory on its face. In addition, it would hinder states in enforcing not only Section 252(e) of the Communications Act, but also their own state statutes that prohibit discriminatory conduct. Rather than rely, as they always have done, on the express terms of an agreement to evaluate its potential to discriminate, state commission would have to find, under the FCC’s proposal, evidence of specific intent to discriminate by the parties. This requirement is unsupportable as a matter of law.

²⁰ FNPRM ¶ 726.

²¹ A subsequent version of the order lists this as footnote 2148.

This aspect of state authority under Section 252 is well settled by the courts.²²

Accordingly, the FCC cannot simply preempt *sub silentio* the authority expressly granted by Congress. Such an action would be the converse of federal preemption, which enables agencies to preempt state action where Congress expressly *denies* the states authority to act. In *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-69 (1986), the Supreme Court held that “[p]reemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, ... where there is implicit in federal law a barrier to state regulation,” and “where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law[.]” In the instant situation, however, Section 252(e) *commands* states to review interconnection agreements, leaving no room for a finding that the FCC may by fiat deny or restrict that review unless the state cedes its authority through inaction. The FCC’s proposal to so starkly limit the ability of state commissions to reject discriminatory agreements is therefore beyond its authority.

The potential for discriminatory agreements under the proposed regime should not be underestimated. As parties in the initial comment round routinely emphasized, interconnection agreements may contain “poison pills,” or provisions that are extremely unpalatable to any other carrier.²³ Under the Commission’s proposal, CLECs would have no

²² *Southwestern Bell Telephone Co. v. Connect Communications Corp.*, 72 F.Supp.2d 1043 (E.D. Ark. 1999) (“The plain language of section 252(e)(1) unquestionably gives the APSC the exclusive authority to approve or reject interconnection agreements for the specific grounds listed in section 252(e)(2).”), *rev’d on other grounds*, 225 F.3d 942 (8th Cir. 2000); *US West Communications, Inc. v. TCG Oregon*, 35 F.Supp.2d 1237, 1245 (D. Or. 1998) (“[T]he Act allows state commissions such as the PUC to participate in the arbitration of interconnection agreements, or to decline participation. If a state commission does not conduct arbitrations and assume other responsibilities under Section 252 of the Act, the FCC preempts the state commission’s jurisdiction.”); *US West Communications v. MFS Intelenet*, 35 F.Supp.2d 1221, 1229 (D. Or. 1998).

²³ Covad Comments at 4-5; AT&T Comments at 3; Z-Tel Comments at 15; WorldCom Comments at 3; Focal Comments at 6.

ability to adopt an agreement without the poison pill, but rather would have to negotiate an entire agreement from the beginning. These proposed provisions thus create a kind of “off-shore tax haven” for parties,²⁴ enabling them to remain the sole beneficiary of the terms of their agreement. This result flatly violates Section 252(i), which guarantees other CLECs the right to adopt some or all of those beneficial terms if they so choose.

It is because of the great potential for poison pills and their inevitably unlawful result that state commissions must retain full authority to reject an agreement that on its face is discriminatory. Under the FCC’s footnote, it appears unlikely that a state could rely solely on the existence of what appears to be a poison pill and, without more, declare the agreement to be unlawful. Footnote 2150, through its “intended to discriminate” caveat, would seem to require a finding of specific intent by the parties — something that is quite difficult to prove and requires a full evidentiary hearing that would be, to say the least, cumbersome. The Commission’s proposal to limit state review in this manner is therefore inappropriate, as well as unauthorized.

IV. THE EXISTING PICK-AND-CHOOSE RULE IS ESSENTIAL TO FAIR COMPETITION AND PROVIDES SUFFICIENT INCENTIVES AND FLEXIBILITY FOR MEANINGFUL NEGOTIATIONS

As the record demonstrates and commenters discuss herein, CLECs remain at a significant disadvantage when negotiating terms for interconnection. The local network is entirely within the control of ILECs, giving them the power and incentive to gate competitive entry simply by gaming the negotiations and the pick-and-choose/opt-in processes. It is thus impossible for the Commission to eliminate, as it proposes, pick-and-choose “without undermining competitors’ rights.”²⁵

²⁴ Z-Tel Comments at 15.

²⁵ *FNPRM* ¶ 725.

A. There Is No Basis for the Commission Now to Find that ILECs and CLECs Have Equal Bargaining Power

Part of the Commission's apparent rationale for proposing the rescission of pick-and-choose is the misguided perception that CLECs somehow now enjoy equal bargaining power with ILECs for purposes of negotiations.²⁶ This concept ignores the imperfections of the current "market" and directly contravenes the Commission's earlier conclusion that, absent pick-and-choose, an ILEC has the power and incentive to "insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement."²⁷ The Commission cannot adopt this radical change in policy absent a clearly articulated reason based on a record not wholly divorced from reality.²⁸

The record in this proceeding provides the Commission with no such reason. As an initial matter, the Commission has not explained why it believes that the pick-and-choose rule has "shortcomings."²⁹ Rather, it has simply quoted the complaints of ILECs, who have also provided us no proof but whose motivation is obvious,³⁰ that "the pick-and-choose rule has produced one-size-fits-all agreements that function much like generally applicable tariffs."³¹ The Commission's reliance on this argument is at the least curious, because the new "all-or-

²⁶ FNPRM ¶ 720 ("it will be especially important for the Commission 'to provide market-based incentives for incumbents and CLECs to negotiate'), ¶ 722 (seeking "the sort of give-and-take negotiations that Congress envisioned.").

²⁷ *Local Competition First Report and Order*, 11 FCC Rcd. at 16138, ¶ 1312.

²⁸ *See State Farm*, 463 U.S. at 43 (holding that an agency action is likely reversible if it "offered an explanation for its decision that runs counter to the evidence before the agency").

²⁹ FNPRM ¶ 727.

³⁰ The comments submitted by ILECs in the 2001 proceeding reveal clear anticompetitive intent. Verizon, for example, argues that any element included in a negotiated agreement must be eliminated as a UNE. Comments of Verizon at 3 (July 3, 2001). In addition, Verizon asks that the Commission craft a rule that permits, but does not require, opt-in, even under the "all or nothing" approach. *Id.*

³¹ FNPRM ¶ 722 (quoting Verizon *Ex Parte* Letter (Jan. 17, 2003)).

nothing” rule it seeks to adopt would achieve exactly this “one-size-fits-all” result. It is anomalous to say that a rule requiring adoption *in toto* of an entire agreement is more likely to achieve diversity in agreements than is a rule permitting adopting of certain sections. Thus, the Commission’s purported goal of discouraging one-size-fits-all agreements simply provides no support for its reversal of position on pick-and-choose.

In addition, several parties demonstrated in their comments that ILECs continue to enjoy an overwhelming bargaining power advantage in negotiations, for the undeniable reason that “the ILECs have something critical that the CLECs lack — a ubiquitous network.”³² As such, they are “the sole provider of wholesale services” in many, if not most, circumstances.³³ Indeed, Z-Tel noted in its comments that ILECs held 97% of switched access lines in 2001;³⁴ the Commission’s latest *Local Competition Report* states that they still hold approximately 87% of those lines³⁵ — a clear demonstration of continuing market power in local telecommunications.³⁶ It therefore cannot be assumed that CLECs — new entrants into a market characterized by a century of monopoly — can enter into typical arm’s length negotiations with the ILECs. Section 252(i) is thus Congress’s way of creating by statute an environment that would not occur naturally. And the record indicates that this mechanism remains as necessary today as the FCC found it to be in 1996.

³² Sprint Comments at 2.

³³ ALTS Reply Comments at 6.

³⁴ Z-Tel Comments at 3.

³⁵ *Federal Communications Commission Releases Data on Local Telephone Competition*, News Release (June 12, 2003).

³⁶ The Supreme Court in *United States v. Grinnell Corp.*, 358 U.S. 242, 249 (1959), that 87% share of the accredited central station service constituted market power. It has also found that 75% market share demonstrates monopoly power. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (cellophane wrap market).

Moreover, it is simply counterfactual to state that ILECs have any incentive to engage in “meaningful marketplace negotiations” with CLECs.³⁷ ILECs are not interested in assisting a carrier that will reduce its market share.³⁸ Rather, as Z-Tel explained, ILECs negotiate and sign interconnection agreements only “because they are required to do so, not because of economic mutual gain.”³⁹ Legal compulsion is their only incentive. In the absence of such compulsion, ILECs would become interested in interconnection only if the revenue and profit were higher than their return on retail services, which would result in grossly inflated costs for CLECs and higher prices for consumers. It would be naïve in the extreme to assume that eliminating pick-and-choose — a key aspect of that compulsion — would move the ILECs to negotiate more freely and engage in the sort of “give-and-take” that the Commission envisions.

B. Pick-and-Choose Is Necessary for Minimizing the Potential for Discrimination and Lowering Barriers to Entry

The pick-and-choose rule protects competitors, notably smaller CLECs, from suffering discrimination and high barriers to entry in the process of establishing interconnection agreements. In addition, pick-and-choose enables smaller CLECs to craft interconnection agreements that meet their specific needs, helping to prevent them from being shoe-horned into an agreement having little to do with their business plans. By allowing CLECs to reject certain portions of agreements that are unnecessary, if not harmful, the rule ensures that CLECs are not subjected to the whims of larger competitors or to endless and expensive negotiations. The members of the CLEC Coalition have employed pick-and-choose to form mutually agreeable contracts — the Xspedius/BellSouth agreement being a prime example — where none of the preexisting agreements were fully acceptable.

³⁷ *FNPRM* ¶ 729.

³⁸ See ALTS Reply Comments at 4; Z-Tel Comments at 8.

³⁹ Z-Tel Comments at 8.

The largest CLECs have the resources to withstand months of intensive negotiations, and enjoy somewhat more equal bargaining power with the ILECs, in order to achieve the interconnection terms that they desire. Unfortunately, they may also have the ability to insert terms into an agreement to which a smaller company could not agree. The current pick-and-choose rule enables smaller companies to avoid those terms — the “poison pills” mentioned above — while still obtaining the more useful parts of the agreement. Moreover, not all carriers have the same business plan, such that interconnection agreements will vary to reflect the differences. Were the Commission to abolish pick-and-choose, these smaller CLECs would be precluded from availing themselves of any part of a larger carrier’s agreement, forcing them to opt-in to another agreement that lacks helpful provisions as well a potential poison pill. Having far fewer resources and far less bargaining power, these CLECs likely would not be able to negotiate and arbitrate a full agreement from scratch — at least not in every instance where one is needed. This result would be patently discriminatory, in violation of Congress’s core precepts in the 1996 Act.⁴⁰

In addition, pick-and-choose is an essential mechanism for lowering the already significant barriers to entering the local telecommunications market. Execution of an interconnection agreement is necessarily the first step for a CLEC that seeks to provide competitive services in any market. Any dilatory conduct by the resident ILEC in negotiating the agreement delays the CLEC’s entry and increases their costs. With pick-and-choose, the ILEC is somewhat constrained in its ability to draw out negotiations, thereby providing the CLEC with some assurance of quick entry. Pick-and-choose also allows the CLEC to speed the process by choosing preexisting sections of an agreement, rather than beginning from scratch to

⁴⁰ *E.g.*, 47 U.S.C. §§ 251(c)(2), 252(e)(2).

negotiate and arbitrate a full agreement. Again, smaller CLECs are the most sensitive to the costs of forging agreements, and multiple negotiations with each ILEC are a prohibitive barrier to entry. Absent pick-and-choose, the negotiations barrier to entry is raised by orders of magnitude. As Congress was keenly attuned to the presence of barriers to entry and the harm they cause to the local market,⁴¹ this result would flatly contravene the 1996 Act.

C. The Commission Misunderstands How Pick-and-Choose Operates

Pick-and-choose does not, as the Commission believes, require ILECs to permit “cherry-picking”⁴² unconditionally and without limit. Rather, it provides CLECs limited power to adopt legitimately related portions of agreements — not necessarily individual provisions that represent only part of a bargain. The ILECs’, as well as the Commission’s, current myopic reading of the pick-and-choose rule reflects neither reality nor the rule itself, as the CLEC Coalition demonstrates herein with several real-world examples.

The Commission’s adoption of Rule 51.809 in the *Local Competition First Report and Order* included the requirement that ILECs seeking to require a CLEC to adopt a particular agreement provision must “prove to the state commission that the terms and conditions were **legitimately related** to the purchase of the individual element being sought.”⁴³ This language in itself has ensured that ILECs are not exposed via the Section 252(i) pick-and-choose process to the one-side of the bargain cherry-picking complained of by the ILECs and apparently presumed (without proof) by the Commission.

⁴¹ Section 253 of the 1996 Act empowers the Commission to preempt state action that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a).

⁴² FNPRM ¶ 719 (quoting Verizon January 17 *Ex Parte*).

⁴³ *Local Competition First Report and Order*, 11 FCC Rcd. at 16139, ¶ 1315 (emphasis added).

Since then, the “legitimately related” caveat has been applied harshly by the ILECs, such that CLECs are required to take large “chunks” of an existing agreement in order to obtain the provisions that they initially sought. Failure to comply with the ILECs’ demands only results in delay, arbitration/litigation, or having to negotiate an entire agreement “from scratch,”⁴⁴ a process that most CLECs, including the members of the CLEC Coalition, cannot afford in every instance, if at all.

The CLEC industry has myriad horror stories to tell about the ILECs’ abuse of, or refusal to comply with, pick-and-choose. For example, SBC has effectively barred KMC and XO from using pick-and-choose at all. In 2002, KMC commenced negotiating a region-wide interconnection agreement with SBC. It had picked several sections from preexisting agreements and presented them to SBC for discussion. SBC refused to agree to execute these sections, insisting that they remain “open items.” SBC categorized so many sections as “open items” that the process soon devolved to mere stonewalling, forcing KMC to adopt one agreement in its entirety rather than submit to endless delay and expense. This experience could not reasonably be termed “cherry picking.”

XO has experienced a very similar process. In 2000, XO began negotiations for an agreement in Ohio and attempted to adopt sections from other preexisting agreements. It also sought to enforce a specific order of the Public Utilities Commission of Ohio related to pick-and-choose. SBC blocked this approach at every turn, causing negotiations to drag on for more than 18 months. In the end, XO opted into a preexisting agreement in December 2001 in order to end the impasse.

⁴⁴ Focal Comments at 4.

In addition, SBC is at this time attempting to force KMC in Indiana to take the reciprocal compensation portion of a requested AT&T agreement, despite having executed a specific reciprocal compensation amendment with KMC that, at SBC's insistence, expressly supercedes all subsequent provisions on that subject. SBC takes the position that the AT&T reciprocal compensation section covers specific issues that are key to the overall AT&T agreement and must be preserved. The KMC-specific section, however, covers every issue that SBC purports to require.

In Illinois, SBC has employed the same tactic with respect to collocation. For example, a Digital Subscriber Line ("DSL") carrier had negotiated a specific provision for cageless collocation in its initial agreement with SBC. When it later, on the expiration of that agreement, attempted to opt into the AT&T-SBC agreement, SBC informed the DSL carrier that it must take the AT&T collocation section without change, and could not bring the previously executed cageless collocation language into the agreement. When the carrier refused this proposal, SBC offered only one option: to take the cageless collocation language from the master SBC 13-state interconnection agreement. Under no circumstances was the DSL carrier permitted to retain the cageless collocation language that it had already negotiated and executed with SBC.

It is also common for SBC to require carriers to adopt the entire General Terms and Conditions section of an agreement in order to obtain any discrete attachment to the agreement. As to the attachments themselves, SBC also forces carriers to accept an entire attachment, or nothing at all. Taken together, these practices have the effect of requiring the CLEC to take the entire agreement without change, which *de facto* nullifies both Rule 51.809 and Section 252(i).

BellSouth has adopted a similarly onerous policy. Invoking the “legitimately related” concept, BellSouth sought to require one CLEC, which had opted into an MCI agreement, to agree that any *subsequent* amendment that MCI desired would be automatically applicable to the CLEC’s agreement. BellSouth presumably believed that such amendments would be “legitimately related” to the underlying agreement, such that the CLEC’s opt-in would be defective without the amendment. Only when the CLEC demonstrated the will and ability to take the matter to arbitration did BellSouth withdraw its purported requirement.

In these circumstances, the CLEC has a Hobson’s choice: take the language thrust upon it, or — as in the example above — take the matter to arbitration. The only other alternative is not to execute an agreement at all, which requires the CLEC to forego market entry entirely. The CLEC often cannot simply take the agreement it wants and submit it for state commission review, as many states preclude unilateral filing of agreements. Thus, pick-and-choose has not been the unbridled free-for-all that ILECs have portrayed.⁴⁵ Rather, experience demonstrates that CLECs often have been denied the rights afforded by the pick-and-choose rule. In short, it is the ILECs that have undermined and abused the current rule, and not the CLECs.

D. The Commission’s Offer to Allow CLECs to Adopt Portions of SGATs Is Not a Reasonable Substitute for the Existing Pick-and-Choose Rule

The Commission proposes to eliminate pick-and-choose where an ILEC has an SGAT on file, such that a CLEC can either adopt individual sections of the SGAT or be forced to adopt negotiated agreements *in toto*.⁴⁶ This proposal does not comport with Section 252(i) in letter or in spirit.

⁴⁵ See, e.g., Verizon January 17, 2003 *Ex Parte* at 3.

⁴⁶ FNPRM ¶ 725.

An SGAT by definition is not a negotiated agreement, but is more akin to a general tariff. With the exception of the rare case in which an SGAT was actually litigated or put out for comment, it reflects little or no CLEC input. Even in cases where SGATs were subject to more than minimal scrutiny, the scrutiny involved did not match that typical of interconnection agreement negotiations or arbitrations. And it certainly was not anticipated that SGATs would one day replace the rights secured by Section 252(i). SGATs thus cannot satisfy Congress's requirement that CLECs be allowed to adopt "any" portion of "any agreement."⁴⁷ An "agreement" by definition requires that two or more signatories have reviewed and acceded to certain terms and conditions.⁴⁸ An SGAT is often simply a regulatory filing, and certainly requires no ascent by a CLEC prior to its filing or going into effect.

Moreover, SGATs often receive little or no state commission review, as they are automatically approved 60 days after filing by operation of Section 252.⁴⁹ As such, it cannot be presumed that SGATs constitute an "agreement ... that is approved by a state commission" as Section 252(i) requires. Nor can it be presumed that they comport with the 1996 Act in any respect, as they may not have had the benefit of any regulatory review. And as a practical matter, an auto-approved SGAT likely does not contain terms or provisions that CLECs require for market entry, having received no CLEC input. In short, an SGAT in no way provides the same or similar rights that Congress granted CLECs in Section 252(i).

The Commission's proffered exemption from the SGAT criterion — that ILECs with no SGAT on file must continue to follow the existing pick-and-choose rule — provides

⁴⁷ 47 U.S.C. § 252(i).

⁴⁸ "An agreement is a manifestation of mutual assent on the part of two or more persons." Rest. Contracts II, § 3.

⁴⁹ "The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission (A) complete the review of such statement ...; or (B) permit such statement to take effect." 47 U.S.C. § 252(f).

little solace. Nearly every state commission has an SGAT on file, to our knowledge.⁵⁰ The SGAT criterion thus provides no escape from the Commission's proposed all-or-nothing rule, contrary to what the *FNPRM* suggests. The Commission's proposal should therefore be seen for what it is: a complete elimination of pick-and-choose, with a meaningless consolation prize offered as justification.

V. THE COMMISSION CAN BETTER ENSURE "MEANINGFUL NEGOTIATIONS" BY PROVIDING CLEAR GUIDANCE ON THE SCOPE OF THE "LEGITIMATELY RELATED" REQUIREMENT

The CLEC Coalition supports the Commission's underlying goal of ensuring that carriers engage in "more meaningful commercial negotiations" that are fair and efficient.⁵¹ We submit, however, that the better means of achieving this goal is to explain more precisely what "legitimately related" means and how it applies to various sections of interconnection agreements. For while this language is useful as a protection against "cherry-picking," the Commission must now ensure that ILECs do not continue to apply it as a sword to cut down fair negotiations.

As we have demonstrated, pick-and-choose is a crucial means of attaining that goal. In its present form, however, the rule provides little guidance as to its proper application, other than the "legitimately related" requirement. Yet, as we have also shown, this concept has been used in an overly restrictive manner by the ILECs, counteracting in large part what Congress intended to achieve via Section 252(i). In order to recover the full power of the statute and achieve a truly efficient negotiating environment, the Commission should revisit its "legitimately related" rationale and provide concrete guidance regarding the types of contract provisions to which it applies.

⁵⁰ Verizon-New York and BellSouth-Florida are notable exceptions.

⁵¹ *FNPRM* ¶ 714.

The Commission should therefore amend Rule 51.809 to add the following bright-

line limitations:

- **Agreement provisions that are not obviously linked, such that separating them would effect an absurd result, are not legitimately related and cannot be imposed on CLECs seeking to adopt a portion of the underlying agreement, unless the underlying agreement expressly states otherwise.**

As the CLEC Coalition has demonstrated, it is a recurring theme in interconnection negotiations for ILECs to insist that terms of preexisting agreements bearing no logical relation to each other are “legitimately related.” Thus, the Commission should hold that, as a general matter, the “legitimately related” requirement may be invoked only where expressly stated in the underlying agreement or where the terms are so obviously interrelated that separating them would lead to an absurd result. In other words, where a provision could, standing alone, enable the ILEC and CLEC to perform the obligation described therein, that provision is not “legitimately related” to any other provision under Rule 51.809.

The CLEC Coalition provides the following examples:

1. The General Terms and Conditions section of an agreement must be amenable to pick-and-choose. For example, a CLEC is entitled to adopt a change of law provision independent of a choice of law provision. ILECs should not force CLECs to accept the entire section, nor should they require CLECs to adopt all General Terms of an agreement as a condition of picking one provision of that agreement.
2. Where an agreement expressly states that otherwise unrelated sections are linked by virtue of a bargain between the parties, a CLEC may not pick-and-choose only one part of that bargain. Thus, for example, if an agreement states that the CLEC may obtain an OCn ring, as a UNE at TELRIC rates, on the condition that it cannot purchase local switching, no CLEC may take the OCn provision without also foregoing local switching.
3. Provisions describing individual aspects of providing access to one particular network element or means of interconnection are legitimately related. Thus, a CLEC should accept all terms related to cageless collocation, but need not also take the terms related to caged collocation. Similarly, a CLEC should accept all terms related to DS-1 provisioning, but should not then be required

to accept terms related to DS-3 provisioning. Any of these terms could operate standing alone.

- **Carriers opting in to all or part of an existing interconnection agreement must not be required to adopt subsequent amendments or attachments that the original parties execute for the underlying agreement.**

It is both illogical and unworkable to require a CLEC that opts into an agreement to take all substantive changes negotiated by the parties to the original agreement. First, an amendment that did not exist at the time of the opt-in cannot reasonably be deemed, in advance, to be part and parcel of that agreement. Second, this requirement would import what could be several changes, if the original CLEC finds that useful, into every opt-in CLEC's business plan, causing considerable uncertainty. Finally, it is a severe abridgment of CLEC rights as a matter of contract law and under Section 252(i) to require them to accept, sight unseen, subsequent contract changes effected by a different party. Pick-and-choose is premised on the concept that the CLEC can review and consider "any interconnection, service or network element," 47 U.S.C. § 252(i), which can only apply to documents in existence at the time of opt in. This language cannot accommodate a requirement that CLECs accept in advance a set of terms and conditions that it had no opportunity to consider.

- **Amendments and attachments to, or portions of, interconnection agreements that by their terms supersede inconsistent language in subsequent agreements between the same parties must be preserved, unless the parties mutually agree otherwise.**

When parties to an agreement execute an insular set of terms that by its express language supercedes any portion of a subsequent agreement dealing with the same subject matter, that set of terms must be ported into the subsequent agreement, unless the parties mutually agree otherwise. These types of amendments are generally executed at the ILEC's


insistence in order to settle a dispute under a prior agreement. As such, they generally represent weeks of intensive negotiations, resulting in a carefully crafted bargain between the parties.

Where the ILEC insists on including language in the amendment expressly stating that it will supercede any corresponding provisions in a subsequent agreement, the ILEC should not be permitted to refuse a pick-and-choose or opt-in request based on the argument that “legitimately related” terms cannot be usurped as previously required by the same ILEC. This requirement simply ensures that the negotiated terms of amendments, which evidence the will of both parties, survive. Indeed, where the parties expressly agree that specific language supercedes later inconsistent language, it cannot be said that inconsistent language in a subsequent agreement is so “legitimately related” that it nullifies express contract language to supercede the subsequent agreement. Thus, unless the parties mutually agree otherwise during the negotiation of a subsequent interconnection agreement, the terms of a preexisting amendment must be permitted to supercede inconsistent language.

VI. CONCLUSION

For the foregoing reasons, the Commission should not eliminate the pick-and-choose rule, 47 C.F.R. § 51.809, as proposed in the *FNPRM*, but should retain the rule and amend it to provide further guidance as to the scope of the rule as commenters propose herein.

Respectfully submitted,

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October 16, 2003